Supreme Court, U.S.
FILED
MAY - 3 2002
OFFICE OF THE CLERK

No. 01-1247

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF WISCONSIN,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY,
CHRISTIE WHITMAN and SOKAOGON
CHIPPEWA COMMUNITY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMICUS CURAE BRIEF OF THE TOWN OF HOBART, THE CITY OF GREEN BAY, BROWN COUNTY, AND OUTAGAMIE COUNTY WISCONSIN IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

INTRODUCTION 1

INTEREST OF THE AMICI 2

ARGUMENT 4

I. THE PETITION SHOULD BE GRANTED BECAUSE IT RAISES QUESTIONS THAT HAVE A SUBSTANTIAL EFFECT ON LOCAL GOVERNMENTS AND NON-INDIAN CITIZENS.....4

II. THE DECISION BY THE SEVENTH CIRCUIT UPHOLDING EPA'S GRANT OF TAS STATUS IS IN DIRECT CONTRAVENTION OF THIS COURT'S RULINGS.....9

A. This Court Has Established Guiding Principles That Circumscribe The Scope Of Tribal Jurisdiction Over Non-Members..10

B. EPA's TAS Policy, Upheld By The Seventh Circuit, Is In Direct Contravention To This Court's Guiding Principles On Tribal Regulation Of Non-Members.....15

CONCLUSION.....19

CASES CITED

Atkinson Trading Company, Inc. v. Shirley,
532 U.S. 645 (2001) 1,10,11,14,15.18

Brendale v. Confederated Tribes and Bands of Yakima,
492 U.S. 408(1989) 11,16,18

Brown County, et al. v. EPA,
Eastern District of Wisconsin
Case No.96-CV-605.....2,4

Montana v. United States,
450 U.S. 544 (1981)...1,10,11,12,13,14,15,17,18

Nevada v. Hicks,
533 U.S. 353 (2001).....10,11,12,14,15,18

State of South Dakota v. Bourland,
508 U.S. 679 (1993).....12,15

State of South Dakota v. Bourland,
39 F.3d. 868, 870 (8th Cir. 1994).....15

Strate v. A-1 Contractors,
450 U.S. 544 (1981)..... 10,11,13,14,15,18

U.S. v. Wheeler,
435 U.S. 313(1978).....11

STATE REGULATIONS AND STATUTES CITED

Wis. Admin. Code Ch. NR 299.....9

Wis. Stats. § 227.42.....9

Wis. Stats. § 227.53.....9

FEDERAL REGULATIONS AND STATUTES CITED

40 C.F.R. §122.26(b)(14)(x).....6

56 Fed. Reg. 64886.....8,16

56 Fed. Reg. 64879.....17

64 Fed. Reg. 68722.....6

33 U.S.C. § 1313; § 303, Clean Water Act.....6

33 U.S.C. § 1342; § 402, Clean Water Act.....6

33 U.S.C. § 1341.....7

33 U.S.C. § 1344; § 404 Clean Water Act 7

33 U.S.C. § 1377; § 518 Clean Water Act.....2

7 Stats. 566, 1838 Treaty of Washington.....5

24 Stats. 338, General Allotment Act of 1887.....5

INTRODUCTION

The decision of the Seventh Circuit will have a substantial and dramatic impact on local governments and their non-Indian citizens in and around Indian reservation areas. The Amici local governments ("Local Governments") urge this Court to grant the State of Wisconsin's Petition for Writ of Certiorari for two reasons.

First, by upholding the Environmental Protection Agency's (EPA) decision to allow tribes to establish water quality standards within their reservations, the Seventh Circuit has created precedent with far reaching impacts. Tens of thousands of persons who are not members of an Indian tribe ("non-members") may now be subject to tribal regulation for routine activities such as the development of a home site on a one-acre lot. This is because of the breadth of the Clean Water Act to which these water quality standards apply, and the large number of non-members who reside within reservation areas. Such a dramatic intrusion on the rights of non-members by tribal governments is of substantial importance and should be reviewed by this Court.

Second, the decision in this case is in direct contravention of the repeated holdings of this Court that, with limited exceptions, "Indian tribes lack civil authority over the conduct of non-members on non-Indian fee land within a reservation." *Atkinson Trading Company, Inc. v. Shirley* 532 U.S. 647 citing *Montana v. United States* 450

U.S. 544 (1981). In reaching a contrary conclusion, the Seventh Circuit erroneously deferred to EPA's interpretation of federal Indian law rather than this Court's decisions.

INTEREST OF THE AMICI

The proposed Amici consist of local governments in the State of Wisconsin that have jurisdiction in and around the Oneida reservation near the City of Green Bay, Wisconsin. ("Local Governments")[1] The Oneida Nation of Wisconsin ("Oneida") is one of four Wisconsin Indian tribes that, like the Sokaogon, was granted authority by the Environmental Protection Agency ("EPA") to promulgate and administer water quality standards under the federal Clean Water Act within its reservation. This authority, which arises out of § 518 of the federal Clean Water Act, codified as amended at 33 U.S.C. § 1377, allows tribes to be treated as states ("TAS") for implementing portions of the Clean Water Act. The Local Governments were among the numerous parties that brought suit against the Environmental Protection Agency ("EPA") challenging EPA's TAS decisions.[2]

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[1] The local governments are the Town of Hobart, the City of Green Bay, Brown County and Outagamie County, and are submitting this brief by their respective authorized law officers pursuant to Supreme Court Rules 37.4 and 37.6.

[2] See, *Brown County, et al. v. EPA*, Eastern District of Wisconsin. Case No. 96-CV-605. That case was consolidated for pre-trial processing and briefing with four other cases in the Eastern District, including the case now on review. (CR 38). Note, the designation

After the suit was commenced, EPA withdrew the Oneida TAS decision in the wake of fraud committed by two of its employees. [3] Court ordered discovery revealed that an EPA staff person and an EPA attorney back dated documents to substantiate alleged non-member impacts, inserted them in the agency record on review and subsequently filed false affidavits to the federal court denying having done so.[4] As a result of EPA's withdrawal of the decision EPA moved to dismiss the case as moot.[5] A similar fate occurred with respect to all of the Wisconsin cases except the case now before the Court.

For these reasons and the reasons set forth below in Section I, the Local Governments have a substantial interest in and a unique perspective on this case.

"CR" refers to the District Court record of the case now on review. "App" refers to the Petitioner's Appendix.

[3] EPA filed a Status Report indicating that affidavits certifying the record may contain false statements and discovery was ordered. CR 179, 196, 197.

[4] The results of the discovery were set forth in the briefs and appendices of the Plaintiffs in Opposition to the EPA's Motion to Terminate Discovery and Motion to Dismiss. See, CR 218, 222, 223.

[5] CR 201, 243.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE IT RAISES QUESTIONS THAT HAVE A SUBSTANTIAL EFFECT ON LOCAL GOVERNMENTS AND NON-INDIAN CITIZENS.

There are several ways in which this decision has a substantial impact on local governments and their non-member citizens. First, there are significant numbers of non-Indians and local government facilities within reservation boundaries that could be affected by this decision. Although the Sokaogon reservation consists of contiguous parcels of land, which are either owned by the tribe and its members, or held in trust for the tribe and its members,[6] many reservation areas do not have those characteristics.

For example, of the 65,000 acres that originally comprised the Oneida reservation near Green Bay, Wisconsin, approximately 85% of the land is owned by non-Indians, and over 85% of the population, nearly 18,000 citizens, are non-Indians.[7] These demographics

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[6] All of the 1850 acres of the Sokaogon reservation are in trust status. App. 29a.

[7] See, Complaint in *Brown Co. et. al. v. EPA*, E.D. Wis., Case No. 96-CV-605; CR 1.

are not a recent phenomenon. To the contrary, these demographic patterns go back nearly a hundred years. The reservation was created for Oneida tribal members by treaty in 1838.[8] However, Oneida reservation land was subsequently allotted to individual Oneida members pursuant to the General Allotment Act of 1887, 24 Stats. 338. By the mid-1920s, only a few hundred acres of the original reservation remained in Indian hands, the rest passed to non-members.[9]

In the decades following the completion of the allotment process, state and local authorities exercised civil, criminal and regulatory jurisdiction of the reservation area. In 1908, the Wisconsin Legislature authorized the creation of the Town of Hobart and the Town of Oneida from the land set apart pursuant to the 1838 treaty. For nearly 100 years, the local governments of the State of Wisconsin have been providing public services, including roads, schools, police and fire protection and other services, to tribal and non-tribal members alike.

Currently, town and county governments operate a variety of public facilities within the reservation boundaries, including the following:

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[8] This treaty, known as the 1838 Treaty of Washington, was executed on February 3, 1838, 7 Stats. 566.

[9] J. Lampisi and L. Hauptman eds., The Oneida Experience: Two Perspectives (1988) p.85.

- The Brown County airport, Austin Straubel International Field;
- The Brown County Golf Course;
- An elementary school;
- Three fire stations;
- Three parks, comprising 54 acres; and
- 97 miles of town and county roads, not including state highways.

Second, the scope of non-member activities potentially impacted by the adoption of tribal water quality standards is extremely broad. While it may first appear that the ability of tribes to set water quality standards under § 303 of the federal Clean Water Act[10] is not likely to affect individual citizens and local governments, nothing could be further from the truth. Historically, water quality standards primarily affected discharge permits required under § 402 of the federal Clean Water Act for discharges from municipal or industrial facilities.[11] Today, however, the program is far broader in application. Among other things, Clean Water Act permits are required for discharges of stormwater from construction sites of one to five acres or more.[12] For example this could include the development of a one-

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[10] 33 U.S.C. § 1313.

[11] 33 U.S.C. § 1342.

[12] 33 U.S.C. § 1342(p). Currently, federal regulations apply to construction sites of five acres or more. *See,* 40 C.F.R. § 122.26(ب)(14)(x). However, on December 8, 1999, EPA promulgated Phase II of its stormwater regulations which requires permits for construction sites of one acre or more, effective in March 2003. *See,* 64 Fed. Reg. 68722.

acre home site. If a tribe has the ability to set water quality standards, those standards must be incorporated into any Clean Water Act permit, including a stormwater permit.[13]

In addition to wastewater discharge permits, the federal Clean Water Act also requires a permit for the discharge of fill material into waters of the United States and wetlands. These permits are issued by the U.S. Army Corps of Engineers under § 404 of the Clean Water Act.[14] Whenever a § 404 permit is issued, the state or tribe must certify that the federal permit meets state or tribal water quality standards. This process, known as water quality certification, effectively allows a state or tribe to veto a federal permit.[15] Thus, if a tribe were to establish water quality standards under its grant of TAS authority, a non-member would now be required to obtain water quality certification from the tribe for a wetland fill of as little as 0.1 acres. Thus tribal water quality standards would provide the basis for vetoing the federal permits.

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[13] Historically tribes have applied for TAS status to set water quality standards, under § 303, rather than authority to actually issue Clean Water Act permits under § 402. In such a case EPA takes the position that it has the authority to issue the permits. However, EPA is bound to use tribal water quality standards. Once a tribe is granted TAS status for § 303, its ability to obtain authority under § 402 is enhanced, because the basic standards for granting such status are the same.

[14] 33 U.S.C. § 1344.

[15] 33 U.S.C. § 1341.

While the above examples concern individual citizens, the same is true if any one of the Local Governments required a federal permit to fill wetlands as part of a utility or road crossing or a permit for the construction of a stormwater detention pond. Given the number of public facilities in the Oneida reservation area, this is not an idle concern. Expansion of airport facilities, road projects, school expansions and park improvements are among the activities that could trigger permitting obligations that involve water quality standards.

Third, the tribal water quality standards proposed to date give substantial discretion to tribal authorities. For example, the water quality standards proposed by the Oneida under its TAS authority included broad narrative criteria that provided in part :

> Any activities that degrade the aesthetic quality, stability and/or ecological integrity of the waters of the reservation shall be prohibited unless authorized in a manner consistent with the water quality standards contained herein.

Equally disconcerting, EPA itself has not limited tribal water quality standards to those which are scientifically justified. Instead, EPA has stated that tribal water quality standards need not "require justification or other evaluation of the scientific merit of criteria" provided that they meet minimum federal standards. 56 Fed. Reg. 64886.

These concerns are further compounded by various procedural shortcomings. At least in the case of Oneida, there was no provision for judicial review of tribal decisions. The review of decisions by the Oneida including the denials of water quality certification would only be subject to tribal administrative review procedures. Contrast this with the rights that other citizens of the State of Wisconsin have with respect to water quality issues. Currently, when Wisconsin issues water quality certifications, those decisions are subject to administrative review through contested cases procedures, under Wis. Admin. Code Ch. NR 299 and Wis. Stats. § 227.42. In addition, any adverse decision by the DNR may be appealed as a matter of right to the state court system. Wis. Stats. § 227.53.

For all of these reasons, a determination that tribes have the inherent authority to set water quality standards will have far-reaching impacts on non-Indian citizens and local governments.

II. THE DECISION BY THE SEVENTH CIRCUIT UPHOLDING EPA'S GRANT OF TAS STATUS IS IN DIRECT CONTRAVENTION OF THIS COURT'S RULINGS.

In its Petition for Review, the State of Wisconsin presents two issues for review. The first raises the question whether Indian tribes possess inherent authority

to regulate navigable waters within its reservation, when under the Equal Footing Doctrine a state holds and exercises sovereignty over such waters and the submerged lands beneath them. The Amici concur with the State's analysis and do not have additional matter to bring to the attention of the Court.

The second question presented in the State's petition is whether EPA policy that tribes possess an inherent authority to establish water quality standards for non-members. This is a matter in which the local governments and its citizens have a direct interest.

A. This Court Has Established Guiding Principles That Circumscribe The Scope Of Tribal Jurisdiction Over Non-Members.

Montana v. United States, 450 U.S. 544 (1981) has been described as the pathmarking case concerning tribal civil authority over non-members, *Strate v. A-1 Contractors,* 450 U.S. 438, 456 (1997) and more recently as "the most exhaustively reasoned of our modern cases" addressing tribal authority, *Atkinson Trading Company, Inc. v. Shirley,* 532 U.S. 645 (2001). See also, *Nevada v. Hicks*, 533 U.S. 353, 358 (2001). *Montana* and its progeny have articulated three guiding principles governing the scope of tribal authority over non-members.

The first guiding principle from *Montana* is "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe." 450 U.S. at 565. This principle stems from the fact that "the Indian tribes have lost many attributes of sovereignty," and " 'the areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe. ...'" Id. at 563-64 citing *U.S. v. Wheeler*, 435 U.S. 313, 326 (1978). Given this divestiture of jurisdiction, the Montana Court emphasized that:

> Exercise of tribal power beyond what is necessary to protect tribal self – government or to control internal relations is inconsistent with the dependant status of the tribes, and so cannot survive without express congressional delegation. 450 U.S. at 564.

This general rule and its underlying rationale have been the starting point for analysis in every case involving tribal jurisdiction over non-members since *Montana*. See, *Hicks*, 533 U.S. at 359; *Atkinson*, 532 U.S. at 650-651; *Strate* 520 U.S. at 446, and *Brendale v. Confederated Tribes and Bands of Yakima*, 492 U.S. 408, 426 (1989).

This general rule is particularly strong where the regulation pertains to non-members on **non-member fee**

land, which is the situation of concern to the Amici. As this Court recently noted, "the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction" *Hicks,* 533 U.S. at 360. Thus, in *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) this Court held:

> [W]hen an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of land by others.

The second guiding principle that has emerged from recent cases is that the exceptions to the *Montana* general rule are to be **narrowly** construed. The *Montana* Court offered two exceptions to its general rule, the second one of which is the basis of EPA's policy in this case. That exception provides as follows:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or the

> health or welfare of the tribe. 450 U.S. at 566.

This Court's recent rulings have repeatedly emphasized that this exception is a narrow one. In *Strate*, the Court explained the *Montana* second exception as follows:

> The Court's statement of *Montana's* second exceptional category is followed by citation of four cases, *ibid.*; each of those cases raise the question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government.
>
> * * *
>
> Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. ...But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or control internal relations." 450 U.S. at 564. *Strate,* 520 U.S. at 458-459.

Based on that analysis, the Court in *Strate* concluded that even when persons endanger the safety of tribal members by driving carelessly on a public highway, the mere presence of a safety concern does not rise to the level of a threat to tribal self-government.

In this Court's two most recent pronouncements on the second exception, the analysis in *Strate* was reinforced and strengthened. In *Atkinson*, this Court held that even though the tribe had an economic interest in imposing a tax on the petitioner's operation of a hotel on non-Indian fee land, such an interest did not have a direct effect on the political integrity, economic security or the health or welfare of the tribe. 532 U.S. at 657. Most recently, in *Hicks,* this Court reaffirmed that the second exception must be understood by looking at the few examples of tribal power to which *Montana* referred. Based on that analysis, the Court concluded that tribal self government would not be impaired by adjudicating in state court a tribal members claims of misconduct against state officers, even when such acts allegedly occurred on tribal land. 533 U.S. at 364.

In short, the mere presence of a public health, safety and welfare issue that affects the tribe does not give rise to tribal jurisdiction over non-members. The touchstone is whether those impacts are sufficiently serious so as to impair the ability of tribal self-government.

The final guiding principle that emerges from *Montana* is that any inquiry as to whether the *Montana* exceptions are met must be a particularized factual inquiry. The Court in *Montana*, determining that the second exception did not apply, evaluated whether there were any actual impacts of the alleged hunting and fishing that would threaten the tribe's political or economic security. In that regard, the Court also looked at the protective effect that state regulations would have on protecting any tribal interests. 450 U.S. at 566-567.

In *Bourland*, this Court remanded the case for a particularized inquiry of the facts. While the lower courts found the non-member activity vexatious to individual Indians, the Court on remand concluded that the activities did not amount to a direct effect on the tribe as a whole. See, *State of South Dakota v. Bourland*, 39 F. 3d. 868, 870 (8th Cir. 1994). This same level of particularized analysis can be seen in *Strate*, 520 U.S. at 459, *Atkinson*, 532 U.S. at 657-659, and *Hicks*, 533 U.S. at 371.

B. EPA's TAS Policy, Upheld By The Seventh Circuit, Is In Direct Contravention To This Court's Guiding Principles On Tribal Regulation Of Non-Members.

EPA concluded that the Clean Water Act did not constitute a delegation of Congressional authority to tribes, and therefore that tribes would be required to

demonstrate they had inherent authority to regulate non-members. 56 Fed. Reg. 64880; App. 105a. EPA articulated its policy for determining whether tribe had inherent authority in 1991 *shortly after this Court's* decision in ***Brendale,*** and noted that the ***Brendale*** case had generated controversy and uncertainty. App. 93a-97a. In response EPA applied a rule that would require "a showing that the potential impacts of regulated activities [by non-members] on the tribe are serious and substantial." App. 97a.

However, EPA concluded that all a tribe would have to do to meet that test is to assert that there is an impact. Once done, EPA would **presume** that there is an adequate showing of jurisdiction:

> The tribe must also explicitly assert that the impairment of such waters by the activities of non – Indians would have a serious and substantial affect on the health and welfare of the tribe. Once the tribe meets this initial burden, EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality discussed above, **presume that there has been an adequate showing of tribal jurisdiction of fee lands,** unless an appropriate governmental entity (e.g. an adjacent tribe or state) demonstrates a lack of

jurisdiction on the part of the tribe. (Emphasis added.)

56 Fed. Reg. 64, 879; App. 100a.

EPA based this presumption on generalized findings that asserted any activities which affect surface water have serious and substantial impacts on the health and welfare of the tribe, App. 98a, and that such impacts meet the requirements of the second *Montana* exception. Indeed EPA concluded that because the management of water quality serves the purpose of protecting public health and safety, it is a core governmental function whose exercise is essential to self-government. App. 99a-100a.

Not surprisingly, given this standard, EPA freely admitted that "the agency believes that tribes will usually be able to meet the agency's operating rule." App. 97a. This conclusion is bolstered by the fact that even in those rare cases that EPA deems the TAS application to be inadequate, it will work with the tribe in order to establish TAS status. App. 107a.

This approach is fundamentally at odds with the three governing principles of this Court noted above. First, instead of beginning with the general rule that tribes do not have regulatory jurisdiction over non-members, EPA creates a **presumption** that tribal jurisdiction over non-members exists. This turns the *Montana* rule completely on its head.

Second, the EPA analysis takes the narrow *Montana* exception and converts it into the general rule. Contrary to this Court's repeated admonitions that the second exception only applies where it is necessary to protect tribal self-government or control internal relations, EPA asserts that any program that protects public health and safety is a "core governmental function" necessary to protect tribal self-government. App. 99a-100a. This type of analysis was squarely rejected by this Court in *Strate*, *Atkinson* and *Hicks*. Protection of public safety, taxation and control over the exercise of civil process, are all core governmental functions, but none were held to be necessary to protect tribal self-government. The question is whether the promulgation of water quality standards was necessary to protect tribal self-government. That question was never considered by EPA or by the Seventh Circuit.

Finally, EPA relies heavily if not almost exclusively on generalized findings as opposed to the kind of particularized inquiry that *Montana* and the cases since *Montana* have required. In contrast to *Montana*, EPA refuses to look at whether state regulations are adequate to protect the tribe from non-member impacts. Instead it again substitutes assumptions for analysis.

EPA's confusion over federal Indian law may have been understandable in the short time immediately following the *Brendale* decision. But whatever confusion may have existed at one point has certainly been resolved

by the numerous cases this Court has issued since that time. EPA should not be allowed to continue to utilize a flawed and outdated analysis as a means of conferring tribal authority over tens of thousands of non-members and their activities.

CONCLUSION

For the foregoing reasons the Amici respectfully request that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 3 day of May, 2002.

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